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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 911

BULL STEAMSHIP LINES, INC., PETITIONER,
VS.
GUY A. THOMPSON, TRUSTEE FOR SAN ANTONIO, UVALDE & GULF RAILROAD COMPANY, DEBTOR.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MARCELLUS G. ECKHARDT, JR.,
Attorney for Petitioner.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Bull Steamship Lines, Inc., defendant in the trial court and appellant in the United States Circuit Court of Appeals for the Fifth Circuit, prays that a writ of certiorari issue to review the judgment of the Honorable Circuit Court of Appeals for the Fifth Circuit entered in the above cause on December 2, 1941, in which cause petition for rehearing was denied on January 2, 1942.

OPINIONS BELOW.

In the District Court, the case was submitted without a jury on exceptions to a Master's Report, and judgment entered against petitioner on February 7, 1941 (R. 51-52)

accompanied by a memorandum opinion (R. 43-50). This judgment was affirmed by the Circuit Court of Appeals for the Fifth Circuit in an opinion not yet reported in the Federal Reporter (R. 178-181).

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered December 2, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (U. S. Code, Title 28, Section 347).

QUESTION PRESENTED.

Where there are two descriptions or brackets in a railroad tariff, each equally appropriate to the shipments in controversy, the first advising there is no applicable interstate rate, and the second advising there is an applicable interstate rate, may the court, in determining the presence *vel non* of ambiguity in the tariff, properly hold that the tariff is unambiguous on its face in disregard of accepted and recognized canons of tariff construction.

STATUTE INVOLVED.

Paragraph 3 of Section 6 of Title 49, United States Code, set forth in the Appendix, *infra*, page 17.

STATEMENT.

The only issue here involved is whether the following tariff (54F) filed with the Interstate Commerce Commission, published and relied upon by the respondent, the plaintiff and appellee below, is plain and unambiguous, so that it fixes a rate of $8.10 per car for movements of freight from one point to another "on the facilities operated by the Corpus Christi Terminal Association at Corpus Christi, Texas."

We quote the tariff:

ITEM No. 1

"Rates in dollars and cents per car on all Classes and Commodities loaded by and at the expense of the shipper, and unloaded by and at the expense of the consignee, between points shown below.

Between (On the One Hand)	And (On the Other Hand)	Rate per Car
All points on the facilities operated by The Corpus Christi Terminal Association At Corpus Christi, Texas	All points on the facilities operated by the Corpus Christi Terminal Association at Corpus Christi, Texas.	*Rate Cancelled
	Industries or Team Tracks within established switching limits of Corpus Christi, Texas on lines named in Note No. 1 below	$8.10 (See Note 2)

Note 1 - San Antonio, Uvalde & Gulf Railroad, St. Louis, Brownsville & Mexico Railway, Texas and New Orleans Railroad, and Texas Mexican Railway.

Note 2 - The rate of $8.10 per car is a net charge for the transportation service described, and does not include any terminal or other charges as provided for in Texas Lines' Tariff No. 21-J, Agent A. C. Fonda's I. C. C. No. 262, or reissues, or in individual issues of carriers on file with the Interstate Commerce Commission.

*Denotes Reduction" (Ex. 13) (R. 145).

1. The nature of the suit.

Guy A. Thompson, Trustee for the San Antonio, Uvalde & Gulf Railroad Company, debtor, sued the Bull Steamship Lines, Inc., to recover alleged undercharges for moving freight by switching between the dates May 1, 1936, and April 4, 1937, contending that the applicable Interstate Tariff No. 54F (R. 145) fixed a rate of $8.10 per car for such movements, whereas only $3.50 had been collected, seeking to recover the difference between the sum collected and what it claims it should have collected, amounting to $4,105.96, with interest (R. 1-5).

All of the movements of freight in controversy originated, moved and terminated entirely within the boundaries of the property owned by the Nueces County Navigation District No. 1, described in the tariff as "the facilities operated by the Corpus Christi Terminal Association at Corpus Christi, Texas" (R. 10). Likewise all of said shipments originated on docks adjacent to petitioner's warehouse, and terminated on "Team tracks" on the opposite side thereof (R. 30).

The extrinsic evidence excluded by the Courts below reflects the following:

When the port of Corpus Christi was opened in 1926 there was put into effect, applicable to said port, a voluntary tariff known as Texas Lines' Tariff No. 54 (R. 15). This was shortly thereafter superceded by Texas Lines' Tariff No. 54 (A), containing the same provision so far as these movements are concerned, which became effective November 9, 1926 (R. 15). The applicable portions of these tariffs read as follows:

"Between (On the One Hand)	And (On the Other Hand)	Rate Per Car
Wharves or Docks on municipally owned tracks serving waterfront locations at Corpus Christi, Texas	Industries or Team Tracks within established switching limits of Corpus Christi, Texas, on lines named in Note 1 below.	$8.10 (See Note 2)" (Ex. 8) (R. 143)

At this time the property of the Navigation District ("the facilities operated by the Corpus Christi Terminal Association") was not included within the limits of the "established switching limits of Corpus Christi, Texas" (R. 14-15, 18). Therefore these tariffs fixed a rate for movements between all points within the Navigation District's property and certain points outside such property. No rate was provided for movements between two points within the boundaries of said property because at that time the "switching limits" did not embrace it.

This tariff was superceded by 54 (B), then by 54 C, and later by 54 D, which latter became effective April 1, 1927 (R. 16). All these tariffs contained the identical wording as tariff 54 A set forth above.

In May of 1929, while tariff 54 D was still in effect, three railroads, including respondent, entered into an agreement for the joint operation of the switching facilities of the Nueces County Navigation District (R. 88-106). By the terms of this agreement each railroad was to take its turn operating the switching facilities over the tracks owned by the Nueces County Navigation District. In this contract certain provisions were made for the movement of cars on the tracks so taken over by the railroad companies and known thereafter as "the facilities of the Corpus Christi Terminal Association."

At the time the Corpus Christi Terminal Association was organized in May of 1929, there was no rate providing for the movement of freight between wharves or docks owned by the Nueces County Navigation District and other points within the boundaries of the property belonging to the District. The rate, in effect, merely provided for a charge of $8.10 per car for movements between points on the property of the Nueces County Navigation District and "industries or team tracks" outside said limits, because, as previously stated, up to May 1, 1929, the switching limits of Corpus Christi did not include the property of the Navigation District (R. 27-28). These limits were extended to include the District's property simultaneously with the forming of the Corpus Christi Terminal Association, and in the same document filed with the Interstate Commerce Commission creating the Terminal Association (Finance Docket No. 7467) (R. 28).

The tariff in effect before these switching limits were extended (Tariff 54 D) in specific language makes the rate applicable only to movements from points within the limits of the Navigation District's property to "industries or team tracks" outside such limits. The one was exclusive of the other.

After the Corpus Christi Terminal Association was organized and after the switching limits had been extended to include the property operated by that Association, there was published a new tariff, No. 54 E, which purported to fix the same rate for movements between all points within the facilities operated by the Corpus Christi Terminal Association as it fixed for movements from points within such facilities to points outside the same. Accordingly, there was filed with the Interstate Commerce Commission Texas Lines' Tariff No. 54 E on September 4, 1929, providing that it should become effective October 15, 1929. In this tariff, for the first time, appears the following:

"Between (On the One Hand)	And (On the Other Hand)	Rate Per Car
All points on the facilities operated by the Corpus Christi Terminal Association at Corpus Christi, Texas.	All points on the facilities operated by the Corpus Christi Terminal Association at Corpus Christi, Texas.	$8.10 (See Note 2)"
	Industries or Team Tracks within established switching limits of Corpus Christi, Texas, on lines named in Note 1 below.	(Ex. 11) (R. 143)

It is clear that the intent of the tariff publisher was to, for the first time, fix the same rate for switching movements between all points on the facilities operated by the Terminal Association as it fixed for movements from points within such facilities to points outside the same.

After the filing of such proposed tariff, which would have made an increase in the rate theretofore charged between points within the boundaries of the Navigation District's property which had never been filed with the Interstate Commerce Commission but by custom had been $3.50 per car (R. 73), the tariff publisher made what is

known as a Sixth Section Application to the Interstate Commerce Commission under the provisions of Paragraph 3, Section 6 of Title 49, United States Code, in which he requested permission to withdraw Tariff No. 54 E and in its place substitute Tariff No. 54 F (R. 16). This application, a copy of which was introduced (R. 143-145), but excluded by the Master and the Court, points out clearly to the Interstate Commerce Commission that the attempt on the part of the respondent to raise the previously charged rate for movements between points within the Navigation District's property was a mistake.

For convenience, we quote the entire application:

"Oct. 4 '39 187566

A. C. Fonda, Agent

Sixth Section Application No. 612.

Dallas, Texas, October 2, 1929

File P-154

To the Interstate Commerce Commission,
Washington, D. C.

The carriers named as parties to Texas Lines' Tariff No. 54-E, I. C. C. No. 274, by A. C. Fonda, their agent, under formal concurrences on file with the Commission from each of such carriers, do hereby respectfully petition the Interstate Commerce Commission that they be permitted, under Section 6 of the Interstate Commerce Act, as amended, to put in force the following rate and regulations to become effective three days after the filing thereof with the Interstate Commerce Commission, but not earlier than October 15, 1929.

To amend Item 1 of the said I. C. C. No. 274 eliminating the first bracket covering movements between points on the facilities operated by the Corpus Christi Terminal Association at Corpus Christi, Texas.

Your petitioner further represents that the proposed change will be published in a reissue of I. C. C. No. 274, and will supersede and take the place of the rate and regulations on like traffic from and to the

same points which are set forth in I. C. C. No. 274 on file with the Commission.

The present charges between points which are to be eliminated from Item No. 1 of I. C. C. No. 274 are not filed with the Commission. the movement between such points being entirely on the municipally owned tracks of the Nueces County Navigation District No. 1.

And your petitioner further bases such request upon the following facts which present certain special circumstances and conditions justifying the request herein made.

Finance Docket No. 7467 of May 7, 1929, authorized the San Antonio, Uvalde & Gulf, St. Louis, Brownsville & Mexico, Texas Mexican and Texas & New Orleans Railroads to operate the terminal facilities of the Nueces County Navigation District No. 1 at Corpus Christi, Texas, under a contract dated January 23, 1929, such facilities to be designated 'Corpus Christi Terminal Association.'

Under this contract the carriers named will extend the switching service of their respective lines to include all movements of loaded cars to or from points on the terminal facilities of the Nueces County Navigation District No. 1 at Corpus Christi designated as 'Corpus Christi Terminal Association' and it is proposed to assess a charge of $8.10 per car for such movements. This charge is correctly published in the second bracket of Item 1 of I. C. C. No. 274, to be effective October 15, 1929, but through an error in the instructions under which publication was made, the same charge was also published in the first bracket of Item 1 to apply between points on the 'Corpus Christi Terminal Association,' formerly the Nueces County Navigation District No. 1 at Corpus Christi. The charges which have heretofore been assessed for movements between points on these municipally owned tracks have been less than $8.10 per car and it is not desired to increase such charges.

Respectfully submitted,

(signed) A. C. Fonda,

Agent for Carriers named and parties to I. C. C. No. 274.

Sworn to and subscribed before me this 2nd day of October, 1929.

(Signed) Katherine Bailey,
Notary Public in and for
Dallas County, Texas."

(R. 143-145.)

After the filing of such application, and before the effective date of Texas Lines' Tariff No. 54 E, and with special permission of the Interstate Commerce Commission under the provisions of Paragraph 3 of Section 6 of Title 49, United States Code, Texas Lines' Tariff No. 54 F, quoted above, was issued, which cancelled all previous tariffs, including 54 E, and which became effective October 15, 1929, in lieu of 54 E.

From the time this tariff was filed until April of 1937, a period of more than eight years, the respondent carrier interpreted it as fixing the rate of $8.10 for movements from points within the Navigation District's property to points outside of same only, and charged a lower rate of $3.50 per car, for movements between all points within such property (R. 73).

2. The contention of respondent and the holding of the courts below.

The rate for these shipments is fixed by the provisions of Tariff 54 F. By its terms it provides a rate of $8.10 per car for shipments from "all points on the facilities of the Corpus Christi Terminal Association at Corpus Christi, Texas" to "Industries or Tream Tracks within established switching limits of Corpus Christi, Texas." These shipments originated at "points on the facilities of the Corpus Christi Terminal Association," and moved to "team tracks within established switching limits of Corpus Christi, Texas." Therefore, the tariff is plain, unambiguous, "specific, definite and clear," fixing the rate of $8.10 per car for such shipments and extrinsic evidence may not be resorted to in explanation thereof.

3. The contention of petitioner.

(a) Tariff 54 F is not plain and unambiguous and is subject to construction because it expressly *reduces* the rate for shipments between "*all* points on the facilities operated by the Corpus Christi Terminal Association of Corpus Christi, Texas" and yet purports to leave the rate unreduced for shipments between *some* points on said facilities.

(b) Being ambiguous, extrinsic evidence is admissible to establish the intent of the tariff publisher in promulgating the tariff, and its interpretation thereof after publication.

(c) The undisputed evidence establishes the fact that it was the intent of the tariff publisher, as well as the actual interpretation it put on its own tariff for more than eight years, that a per car rate of less than $8.10 should be charged for shipments between "all points on the facilities operated by the Corpus Christi Terminal Association" and that a per car rate of $8.10 should be charged for shipments between points located on such facilities and "industries or team tracks" *outside* the boundaries thereof (R. 143-145).

(d) Since the respondent, the tariff publisher, by its own act reduced the rate for movements within these boundaries below $8.10 without publishing a specific rate covering such shipments, there is no applicable interstate rate governing them, and none can be enforced against a shipper. *Tex. & Pac. R. R. Co.* v. *Am. Tie & Timber Co.,* 234 U. S. 138, 58 L. Ed. 1255, 34 S. Ct. 885.

4. The proceedings below.

The cause was referred to a Special Master (R. 21-22), upon whose report (R. 22-32) judgment was rendered for the full amount claimed, with interest (R. 51-52). Petitioner's exceptions to the Master's report (R. 32-42) were overruled (R. 50-51). The Trial Court filed a mem-

orandum opinion, holding, among other things, that the Interstate Tariff 54 F in force and applicable to the issues in this case was plain and unambiguous, and therefore that neither extrinsic evidence nor construction was called for, and that the Master did not err in refusing to permit the introduction of extrinsic evidence to establish the history of the tariff and the interpretation placed thereon prior to April, 1937 (R. 43-50).

The Honorable Circuit Court of Appeals affirmed this judgment, holding, as did the Trial Court, that tariff 54 F is plain, unambiguous, specific, definite and clear (R. 178-181), despite the fact that two separate and distinct classifications of origin and destination are set forth in the tariff, one of which was expressly reduced below the rate sought to be enforced and into which classification all of the shipments involved in this suit fall.

SPECIFICATIONS OF ERROR TO BE URGED.

The Circuit Court of Appeals erred:

(1) In holding that there is no ambiguity in tariff 54 F.

(2) In holding that extrinsic evidence was not admissible as an aid to the proper construction of tariff 54 F.

(3) In rendering judgment for the respondent, in view of the fact that the rate contended for by it is not fixed by any applicable interstate tariff.

REASONS FOR GRANTING THE WRIT.

The decision below construes the tariff in controversy in a manner inconsistent with accepted canons of tariff construction exemplified by decisions in similar cases in other circuits and, therefore, presents a conflict of circuit court of appeals decisions justifying a grant of the writ.

The inconsistency between the canons of construction the court below applied in construing the tariff here

involved and those which other circuit courts have applied in construing similar tariffs will be made clear by the following discussion.

Prior to October 15, 1929, the local rate for interstate shipments like those here involved between points wholly within the area containing the facilities operated by the Corpus Christi Terminal Association, hereinafter referred to as the terminal area, was $3.50 per car. There was no applicable interstate rate.

The controlling issue is whether the tariff in controversy, which went into effect on that date, did, as respondent-carrier contends, or did not, as petitioner-shipper contends, establish an interstate rate for shipments between points wholly within the terminal area. Of course, whether it did or not depends on the meaning of the terms of the tariff, to be gathered from its face if there is no ambiguity and to be arrived at by resort to extrinsic evidence if there is ambiguity.

The tariff contains two descriptions or brackets, each describing various points to which it applies.

The first description relates to *all* movements between points wholly within the terminal area. It specifies no interstate rate. The notice it gives the shipper is, "Rate Cancelled," with a confusing footnote saying this "Denotes Reduction." Obviously, if the carrier had intended to establish and publish an interstate rate for movements between points wholly within the terminal area it would have specified a definite rate in the first description of the tariff. Carrier's failure to do so and the inclusion in the tariff of the notation, "Rate Cancelled," with the bewildering footnote, "Denotes Reduction," would seem clearly to warrant the shipper in concluding that as to all movements within the terminal area there is no interstate rate applicable. For eight years after the promulgation of the tariff—the years in which the shipments in controversy were made—both carrier and shipper construed the tariff as meaning that it did not establish an interstate rate for movements between points wholly

within the terminal area and that the proper rate to be applied to such movements was the local rate of $3.50.

The second description of the tariff specifies that an interstate rate of $8.10 per car shall apply to all movements between any point in the terminal area and any industry or team track lying within the "established switching limits of Corpus Christi." These limits include the terminal area.

The movements here involved were between points wholly within the terminal area, hence they fall within the first description of the tariff.

They also were between a point in the terminal area and team tracks within the established limits of Corpus Christi, hence they fall within the second description, too.

Thus, the tariff advises the shipper, on the one hand, that there is no interstate rate and, on the other, that there is an interstate rate. Plainly, there cannot be, as to the same movements, no interstate rate and an interstate rate both at the same time.

In short, the tariff is ambiguous on its face and, unless resort be had to extrinsic evidence, it is not clear and cannot be definitely determined whether or not the tariff establishes an interstate rate for movements between points wholly within the terminal area.

The court below, however, held the tariff unambiguous on its face, and on that ground affirmed the refusal of the district court to admit extrinsic evidence concerning the meaning of the tariff as understood and acted on by both shipper and carrier for eight years.

Petitioner contends that it would have been impossible for the court below to reach the decision it did, namely, that the tariff is unambiguous on its face, if it had applied the following accepted and recognized canons of tariff construction enunciated and applied in similar cases by other circuit courts of appeals:

1. "Tariff schedules are to be considered as a whole, including foot notes, and if doubtful in meaning the construction will be applied that is most favorable to the Shipper." *Raymond City Coal & Transportation Corporation* v. *New York Cent. Ry. Co.*, (6th Cir.) 103 F. 2d 56.

2. "Tariffs should not be contrived in catch-penny terms to catch the ignorant and unwary." *Atlantic Coast Line Ry. Co.* v. *Atlantic Bridge Co.*, (5th Cir.) 57 F. 2d 654.

3. "All" is a word of great significance. Its use in a tariff, as in a statute or constitution, must be given great weight. *Williams* v. *United States*, 289 U. S. 553, 572, 77 L. Ed. 1372, 1380.

4. "It is a cardinal rule of construction that effect should be given to every word, phrase, clause and sentence in a tariff." *Carpenter* v. *T. & N. O. R. Co.*, (5th Cir.) 89 F. 2d 274, 277; *Chicago Great Western Ry. Co.* v. *Farmers' Shipping Association*, (10th Cir.) 59 F. 2d 657, 659; *Updike Grain Co.* v. *Chicago N. W. Ry. Co.*, (8th Cir.) 35 F. 2d 486, 487; *Van Dusen Harrington Co.* v. *Northern Pac. Ry. Co.*, (8th Cir.) 32 F. 2d 466, 468; *Pillsbury Flour Mills* v. *Great Northern Ry Co.*, (8th Cir.) 25 F. 2d 66, 68, 69.

5. Tariffs should be construed in the way a shipper would naturally and reasonably understand them, giving the words used their customary meaning, and to hold a shipper to something else after he has become obligated through reliance on such meaning will result in deception and loss caused by the carrier to its advantage, and all reasonable doubt must be resolved in favor of the shipper. *Union Wire Rope Corp.* v. *A., T. & S. F. R. Co.*, 66 F. 2d 965, (Cert. Den.) 290 U. S. 686, 78 L. Ed. 591, 59 S. Ct. 122.

6. "It is a cardinal rule of tariff construction that special provisions control general provisions." *United States of America* v. *Gulf Ref. Co.*, 286 U. S. 542, 546, 69 L. Ed. 1082, 1085, 45 S. Ct. 597; *Boone* v. *United States*, (6th Cir.) 109 F. 2d 560, 562; *Gideon-Anderson Lumber Co.* v. *St. L. S. W. Ry. Co.*, (8th Cir.) 88 F. 2d 232, 235.

7. Where the tariff publisher cancels a previous tariff it no longer remains in effect, irrespective of the validity of the tariff which supercedes it. *Chicago, I. & L. Ry. Co.* v. *International Milling Co.*, (8th Cir.) 43 F. 2d 93, (Cert. Den.) 283 U. S. 885, 75 L. Ed. 781, 51 S. Ct. 89.

8. Extrinsic evidence may be resorted to in aid of the construction of a tariff of doubtful meaning. *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S., 285, 291, 292, 66 L. Ed. 943, 946, 947.

Under the holding of the Circuit Court of Appeals in this case no meaning whatsoever is given to the first bracket of the tariff, which expressly cancels *and reduces* the rate for shipments between "all points on the facilities operated by the Corpus Christi Terminal Association." It is as though the tariff simply read:

"Between (On the One Hand)	And (On the Other Hand)	Rate Per Car
All points on the facilities operated by the Corpus Christi Terminal Association at Corpus Christi, Texas.	Industries or team tracks within established switching limits of Corpus Christi, Texas on lines named in Note 1 below.	$8.10

There is no more reason for considering this second bracket alone than there is for considering the first bracket alone. If the first bracket alone is considered, the tariff would read:

"Between (On the One Hand)	And (On the Other Hand)	Rate per Car
All points on the facilities operated by the Corpus Christi Terminal Association at Corpus Christi, Texas	All points on the facilities operated by the Corpus Christi Terminal Association at Corpus Christi, Texas	*Rate Cancelled

If it read thus, no rate would be fixed by it for any type of shipments.

Furthermore, the tariff cannot be interpreted, without regarding the first bracket and the footnote, unless extrinsic evidence is resorted to. Movements between "all points" in a designated area are reduced. Unless resort is had to the tariff (54 E) which is superceded, a shipper cannot know what the rate is reduced from. But when a shipper resorts to this superceded tariff, he finds that the rate for these movements was $8.10 by the provisions of this superceded tariff. Therefore, he naturally concludes that the rate is less than $8.10 because it has been "reduced" below that figure by the express terms of the new tariff.

In view of the foregoing, petitioner earnestly urges that the court below construed the tariff in controversy inconsistently with canons of construction exemplified by decisions in similar cases in other circuits and that therefore there is presented a conflict of decisions warranting review by this Court.

The matter is important because of the frequency with which railroad tariffs like the one here involved come up for construction in circuit courts of appeals. Obviously, there should be uniformity among these courts as to the canons of construction applied in determining ambiguity *vel non*—the issue involved in the instant case —of such tariffs. Petitioner therefore urges that this court exercise its certiorari jurisdiction in this case with a view of correcting the decision below so that it will be in line with decisions in similar cases in other circuits.

CONCLUSION.

Therefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

MARCELLUS G. ECKHARDT, JR.,
Attorney for Petitioner.

January, 1942.